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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

SHELTON NOEL HAYNES, PETITIONER

vs.

PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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Attorney for Petitioner
SHELTON NOEL HAYNES

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SHELTON NOEL HAYNES

QUESTIONS PRESENTED

1. Whether the commencement of a criminal action against a defendant in custody may be delayed in order to deprive the defendant of his Sixth Amendment right to counsel at an identification proceeding.

2. Whether introducing into evidence the testimony of a victim whose recollection has been tainted by hypnosis deprives a criminal defendant of his Sixth Amendment right to confront witnesses.

3. Whether refreshing a witness's recollection by use of hypnosis deprives a criminal defendant of his Fourteenth Amendment right to due process of law.

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Petitioner, SHELTON NOEL HAYNES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Fourth Appellate District, Division One, entered in the proceeding on May 24, 1983.

OPINION BELOW

The opinion of the Court of Appeal (Appendix A, infra, 1a-16a) is not reported.

JURISDICTION

The judgment of the Court of Appeal was entered on May 24, 1983. On June 29, 1983, Shelton Noel Haynes petitioned the California Supreme Court for a hearing. The California Supreme Court denied that request on August 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him, ... and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1:

> ... No state shall ... deprive any person of life, liberty, or property, without due process of law ...

STATEMENT OF FACTS

On January 31, 1981, Petitioner and his wife, Leslie, entered Hoagie's Market on El Cajon Boulevard in San Diego. (Reporter's Transcript, hereinafterer "R.T.", Vol. VIII, 730, 732). They made their purchase and returned to their home where they remained for the rest of the evening. When Mrs. Haynes fell asleep at 1:00 a.m., Petitioner was watching television. (R.T. 732).

Lois Miller, a Hoagie's Market employee, saw Mr. and Mrs. Haynes in the store at 10:30 p.m. on January 31, 1981. She remembered Petitioner was wearing a

white shirt and sport jacket and light grey or blue slacks. Ms. Miller also remembered seeing another Black man at the store that evening. This man had short hair and a dark raincoat. He looked similar to Petitioner but had a longer and thinner nose. The man gazed into the dairy case. Ms. Miller told the police about this man when they interviewed her five days later. (R.T. VIII 710-713).

Jane Cusack also went to Hoagie's Market that evening. She arrived at approximately 10:30 p.m., made a purchase, and left. (R.T. 120-121). As she returned to her car, a knife-weilding Black man approached her and said, "Give me your money." Ms. Cusack complied. (R.T. VI 122). When Ms. Cusack later spoke with police officers, she then estimated the knife blade was four (4) inches long. She described the man who accosted her as a 22 year-old Black male, 5'7" tall, and weighing approximatey 140 pounds. She described the

man's hairstyle as a short afro. (R.T. VI 135-140). Ms. Cusack described the man's clothing as dark letterman's-type jacket without a letter, black pants, and a dark T-shirt. She noted no scars on the man's face or hands but remembered he had big lips. (R.T. VI 154-155). Her description to the police was used by the police sketch artist who prepared a drawing of the suspect's face. (R.T. VI 142). Mrs. Haynes testified that Petitioner does not own a long-sleeved dark jacket fitting Ms. Cusack's description. Both she and Petitioner also testified that Petitioner has Marine Corps tattoos on his arms and scars on his right hand. (R.T. VIII 739, 790-791).

After Ms. Cusack gave money to her assailant, the man told her to move into the passenger seat of her vehicle and disrobe. Ms. Cusack complied. (R.T. VI 123). The man then drove the vehicle out of the parking lot and around the San Diego area,

stopping at a motel where he purchased some Benson & Hedges menthol cigarettes from a machine. While they were driving, the man touched Ms. Cusack's breasts and vagina and she orally copulated him. (R.T. VI 126, 128). They then drove to the street where Ms. Cusack lived and had sexual intercourse. (R.T. VI 129). After they completed the act of sexual intercourse, Ms. Cusack wiped herself with a towel and talked with the man. He told her his name was Junior, that he was a mechanic, and that he could help her fix her car. [1/] The man then drove to 35th and Meade Streets and exited the vehicle. (R.T. VI 132-135).

On February 1, 1981, the day after the Cusack incident, Petitioner and his wife got up late. Mrs. Haynes testified that she stayed home with Petitioner until 3:00 p.m.

[1/] Petitioner testified that he has never called himself Junior. (R.T. VIII 779).

when she went to a laundromat. (R.T. VIII 732-733). Petitioner testified that while his wife was gone, he drank beer and fell asleep in the afternoon without leaving the house. (R.T. VIII 787, 788). When Mrs. Haynes returned home with her sister at dusk, Petitioner was still asleep. (R.T. VIII 735).

At approximately 7:00 p.m. on February 1, 1981, Elizabeth Silva went to Hoagie's Market at El Cajon Boulevard and 35th Street in San Diego. (R.T. VI 77). She left the store and was arranging items in her car when a knife-wielding black man entered the vehicle and started to drive it away. The man put on some black gloves and told Ms. Silva to disrobe. She pretended to do so, but then escaped by jumping out of the moving car. (R.T. VI 78, 79, 82, 83, 187).

Ms. Silva described her assailant as clean-shaven, wearing a print shirt with dark pants. (R.T. VI 184). He was between

5'9" and 6 feet tall with a medium build weighing approximately 140 to 150 pounds. (R.T. VI 193). She remembered the man's hair style was shorter in the back than in the front. (R.T. VI 101). The knife had a five-inch blade and a brown wood-tone-type handle. (R.T. VI 188, 193).

At approximately 7:05 p.m. on February 1, 1981, Linda O'Mara was returning to her car when a knife-wielding black man approached from behind and ordered her into the vehicle. (R.T. VII 300). Ms. O'Mara refused and a struggle ensued. The incident lasted 15 seconds and ended when the man walked away at a fast pace. (R.T. VII 301, 320). Ms. O'Mara described him as having a short afro with slightly longer hair on top, a slim build, and weighing approximately 120 pounds. (R.T. VII 309). She noted no facial hair nor facial scars. (R.T. VII 321, 322). The man wore a black and grey striped sweater and dark dress pants.

Petitioner does not own a grey striped sweater. (R.T. VIII 738).

At 9:00 p.m. that same evening, a Black man assaulted Gwendolyn Walton as she walked home on 41st Street in San Diego. (R.T. VI 38, 39, 61). The man grabbed her right arm and held a knife to her side. He then told her to strip. Ms. Walton pretended to comply but then threw down her purse and keys and ran away screaming. (R.T. VI 40-43).The area where the incident took place was described as poorly lit. (R.T. VI 46). There were no street lights, only lamp posts near some apartments. (R.T. VI 38). The lights near the apartment complex had small 25 watt bulbs. (R.T. VI 62).

When Ms. Walton first saw the man's face, she was 100 feet away from her apartment. (R.T. VI 62). She saw his face again for eight seconds during the attack. (R.T. VI 63). When she spoke to police

later that evening, she described the man as five feet ten inches tall and slim. (R.T. VI 44). She believed the man's hairline was straight. (R.T. VI 45). She could make out a faint mustache. She estimated the knife blade to be four inches long. (R.T. VI 48).

On February 7, 1981, Petitioner prepared dinner for himself and his wife and spent the evening working on tax forms. (R.T. VIII 789). Mrs. Haynes testified that she and her husband were home throughout the evening. She remembers the exact date because she had to mail the tax forms the next day. (R.T. VIII 736, 737).

At 7:00 p.m. that evening, Jewell Hislope met a black male while doing her laundry. (R.T. VI 204-205). After she finished folding her clothes, she agreed to let the man carry them to her car. (R.T. VI 208). As they put the clothes in the car, the man got into the driver's seat, and holding a knife in his right hand, ordered

Ms. Hislope to move over. (R.T. VI 209, 211). The man put on some red gloves and drove away with Ms. Hislope. (R.T. VI 212, 214). The man told Ms. Hislope his name was James, that he was from Detroit, and that he had three brothers all of whom were named after his father. (R.T. VI 214). He also used the name Junior. (R.T. VI 228). Petitioner does not have any brothers nor has he ever lived in Detroit. (R.T. VIII 790). While she was in the car with him, they smoked some Marlboro 100 cigarettes, placing the butts in the car's ashtray. (R.T. VI. 229, 230). They stopped at a convenience store. (R.T. VI 215, 216). While inside the store, Ms. Hislope alerted a clerk to call the police. She broke away from the man and escaped into a back room. Her car and its driver disappeared. (R.T. VI 217, 218). Ms. Hislope later spoke with the police and described the man as a 24-year old clean-shaven Black male with a

short military-style haircut. She thought he was five feet eleven inches tall weighing 165 pounds. He had neither scars nor tattoos on his face. (R.T. VI 237, 238).

Prior to February 19, 1981, San Diego Police Department Detective Evans contacted Ms. Cusack to suggest she undergo hypnosis. (R.T. VI 158). For one hour prior to the hypnosis session, Officer Beronda instructed Ms. Cusack about hypnosis, telling her the mind was like a camera and that she would remember everything. (R.T. VI 161). During hypnosis, he asked her many things she was nevertheless unable to recall. (R.T. VI 164). At some point during the session, Ms. Cusack helped Officer Warburton revise her first composite sketch. (R.T. IV 355). The second composite which resulted differed from the first, specifically with respect to the suspect's hair style. (R.T. IV 339). At the conclusion of the session, Ms. Cusack was given the post-hypnotic suggestion that

if she ever saw the person she had been describing, she would have no problem identifying him. (R.T. IV 388). She later could not recall this post-hypnotic suggestion. (R.T. IV 351).

Officer Penalosa was patrolling in the East San Diego area on Thursday, February 26, 1981. (R.T. III 79). He had read crime reports of a number of sexual assaults in the area and had also reviewed a composite of one suspected assailant. (R.T. III 81). The officer knew the suspect in the case was a Black male between 5'7" and 5'10" tall and of medium weight. The suspect also reportedly wore a black letterman's jacket. (R.T. III 82). He contacted Petitioner, who is Black, on the morning of February 26, 1981, because he believed Petitioner's hair, nose, and lips were similar to those of the composite drawing he had seen. (R.T. III 82, 83). At the time Officer Penalosa detained him, Petitioner was wearing a dark

jacket he acquired in Korea which has military patches and writing. (R.T. III 93, 190-191).

Petitioner responded to the officer's questions and produced identification. (R.T. III 93). The officer then learned that Petitioner lived in the general area of the assaults and that according to a Texas driver's license, his name was Shelton Haynes, Jr. The officer remembered that the suspect in one of the reports was named Junior. (R.T. III 84, 85). Officer Penalosa decided to take Petitioner downtown for interviews with detectives, arresting him if necessary. (R.T. III 115). Officer Penalosa asked Petitioner if he had any weapons. He then seized the small pocket knife Petitioner produced. (R.T. III 86). At headquarters, the officer photographed and took Petitioner's fingerprints. (R.T. 88, 89, 110). Petitioner was next taken to the sex crimes office where Detective Murphy

questioned him. (R.T. III 89, 125). Prior to being advised of his Miranda rights, detectives asked Petitioner where he lived, what kind of clothing he owned, and whether he liked white women. (R.T. III 197). They also asked him for his whereabouts on certain dates. (R.T. III 198). Officer Evans then admonished Mr. Haynes of his Miranda rights, removed Petitioner's handcuffs, and questioned him. After the detectives finished, Officer Penalosa took Petitioner home. (R.T. III 125, 126). Officers detained Petitioner at the sex crimes office for approximately one-half hour. (R.T. III 145).

After Petitioner went home, the detectives placed the photograph taken by Officer Penalosa in a photographic lineup. (R.T. III 126). Then they took the photographic lineup to Jane Cusack, the previously hypnotized victim, at her place of employment. At 3:20 p.m., she

identified Petitioner's photograph. (R.T. 126). The detectives next went to the Haynes' home, without first obtaining an arrest warrant, and knocked on Petitioner's door. (R.T. III 127). Petitioner testified that he remained inside his house while the officers attempted to persuade him to voluntarily come out and talk with them. Petitioner told the officers he had nothing to say to them. Detective Evans then told Petitioner he was under arrest. (R.T. III 202). The officers told Petitioner to step out onto his porch. When he did, the officers apprehended Mr. Haynes and took him back to the police station for further questioning. (R.T. III 148, 204).

After questioning, Petitioner was taken to a hospital where officers obtained samples of his hair, blood, and saliva. (R.T. III 150). He was then booked. (R.T. III 205). Detective Murphy testified that he had enough evidence to file charges

against Mr. Haynes after Ms. Cusack's identification at 3:20 p.m. on February 26, 1981. (R.T. III 154). By the detective's own admission, however, he was not concerned with immediately arraigning Petitioner. (R.T. III 495). The following day, officers scheduled a lineup for March 2, 1981, four days after Petitioner's arrest. (R.T. III 129).

Petitioner repeatedly requested an attorney prior to the lineup, but Officer Murphy told him he did not have the right to have an attorney present at the lineup. (R.T. III 155). The lineup took place on March 2, 1981. (R.T. III 207). Petitioner attended without benefit of counsel, despite the fact that Defenders, Inc., a law firm across the street from the courthouse, would have provided him an attorney. Defenders, Inc., routinely supplies attorneys for pre-indictment or prefiling lineups. (R.T. III 171). At the lineup, Jane Cusack, Linda

O'Mara, Elizabeth Silva, and Jewell Hislope identified Petitioner as their attacker. (R.T. VI 96, 150, 221, 312). Gwendolyn Walton identified Petitioner as closely matching the description of her attacker. (R.T. VI 66). At trial, she was not absolutely certain Petitioner was the man who attacked her. (R.T. VI 57). Neither Ms. O'Mara nor Ms. Walton identified Petitioner from photographs as their assailant. (R.T. VI 50, VII 312).

Petitioner was not arraigned nor provided counsel until March 3, 1981, five days after his arrest. (R.T. III 161). Statements Petitioner made to detectives the first and second time he was arrested and before he obtained counsel were admitted against him at trial. (R.T. III 349-352, 356-357, 361-362). Also admitted against Petitioner were the fruits of a search warrant Detective Evans executed on Petitioner's residence on March 6, 1981.

Included were a packet of Benson & Hedges cigarettes found in the refrigerator, a pair of black leather gloves, and a pair of red knit gloves. (R.T. III 370).

Following a jury trial in the Superior Court of the County of San Diego, Petitioner was convicted on July 30, 1981, of crimes against five separate persons alleged in eighteen counts, to wit (1) robbery, with use of a deadly weapon, (2) assault with a deadly weapon, (3) kidnapping with use of a deadly weapon, (4) forcible oral copulation with use of a deadly weapon, and (5) rape with use of a deadly weapon, against Jane Cusack; (6) assault with a deadly weapon, (7) attempted kidnapping with use of a deadly weapon, and (8) assault with intent to commit rape, with a deadly weapon, against Linda O'Mara; (9) assault with intent to commit rape, with use of a deadly weapon, and (10) assault with a deadly weapon, against

Gwendolyn Walton; (11) assault with a deadly weapon, (12) kidnapping with use of a deadly weapon, (13) assault with intent to commit rape, with use of a deadly weapon, and (14) grand theft of an automobile, against Jewell Hislope; and (15) kidnapping with use of a deadly weapon and infliction of great bodily injury, (16) assault with intent to commit rape, with use of a deadly weapon and infliction of great bodily injury, and (18) grand theft of an automobile, against Elizabeth Silva.

On November 6, 1981, Appellant was committed to the Director of Corrections for a term of thirty-seven (37) years.

Petitioner appealed his conviction to the California Fourth District Court of Appeal on the grounds that the trial court wrongfully admitted the testimony of a victim whose recollection was tainted by hypnosis. The trial court learned of the inherent unreliability of Ms. Cusack's

testimony during lengthy pretrial hearings concerning its admissibility. Dr. George Pratt, a clinical psychologist who has for several years taught hypnosis at medical schools, testified about the dangers of accepting testimony tainted by hypnotism. (R.T. IV 426, 429). He testified that hypnotized persons commonly fill memory gaps with inaccurate data. (R.T. IV 447). Dr. Pratt further testified that the unconscious cueing characteristic of the type of hypnotic session the San Diego Police Department used probably contaminated and biased Ms. Cusack's memory. (R.T. IV 467).

Dr. Fay Girsh, a clinical and forensic psychologist, also testified regarding the use of hypnosis to enhance memory. (R.T. VI 512). According to Dr. Girsh, a hypnotized person is more susceptible to suggestion than a normal person and also is more likely to invent information which is

not part of actual memory. After undergoing hypnosis and inventing information, the subject cannot recall exactly which information he or she created. (R.T. IV 514). Telling a hypnosis subject that the mind records everything further implants in her mind the idea that everything will be remembered, even if this is not true. (R.T. IV 516). Post-hypnotic suggestions to the subject that he or she will be able to identify the person visualized during the session leads the subject to believe positive identification is possible. Dr. Girsh therefore concluded that the techniques used most likely contaminated Jane Cusack's memory. (R.T. IV 519).

Petitioner also appealed on the grounds that he was irreparably prejudiced by an unnecessary arraignment delay which resulted in a denial of his right to counsel at the lineup. He alleged that had

counsel been present, Petitioner could have presented evidence at trial regarding the suggestive nature of the lineup. As the court noted, the lineup participants differed in appearance in terms of facial hair, beards, mustaches, heights, and weights. (R.T. III 266-270). Petitioner would have obtained color photographs of the procedure and a tape recording of statements made. Instead, the court was limited to review of black and white photographs of the lineup. (R.T. III 269).

The Court of Appeal rejected Petitioner's arguments and affirmed the judgment of the trial court. Mr. Haynes petitioned the California Supreme Court for review of his case. His request for a hearing was denied on August 11, 1983.

REASONS FOR GRANTING THE WRIT

This case involves the interplay of suggestive pretrial identification procedures with the fundamental

constitutional rights to effective assistance of counsel and to confront witnesses.

I. Petitioner's Right to Assistance of Counsel at His Lineup Was Unconstitutionally Denied.

This Court has held that a defendant's Sixth Amendment right to assistance of counsel extends to identification proceedings occurring after the commencement of the criminal action. United States v. Wade, 388 U.S. 218 (1966). In the instant case, formal commencement of the criminal action against Petitioner was delayed thereby forcing him to appear in a lineup without benefit of counsel. The California Supreme Court recently extended to defendants the right to counsel at prearraignment lineups in People v. Bustamante, 30 Cal.3d 88 (1981). Although Bustamante was decided too late to be dispositive in the instant case, both the majority and concurring opinions note

counsel's important role at a lineup. As the court noted, having counsel present at lineups encourages the police to adopt and follow regulations which ensure the fairness of the lineups. An attorney may detect inadvertent suggestive actions not within the scope of these protective regulations. These observations will help the attorney prepare for cross-examination at trial.

This Court in Wade also specifically emphasized the relation between a defendant's Sixth Amendment right to counsel at a lineup and his right to confront witnesses. Counsel's presence was deemed necessary at pretrial identification procedures to ensure that the procedures were not so improperly suggestive as to solidify a witness's views thereby preventing effective cross-examination. Wade, supra, at pages 223-227. See also, Moore v. Illinois, 434 U.S. 220 (1977);

California v. Green, 399 U.S. 149, 159 (1970).

Petitioner was denied the right to counsel at this crucial stage. The fruits of the lineup were consistently used against Petitioner at trial. Witnesses repeatedly identified Petitioner as the man they selected at the live lineup (R.T. VI 56, 57, 96, 221). The identifications formed the basis for part of the affidavit in support of the warrant to search his house.

II. Admission of Hypnotically-Induced Testimony Violated Petitioner's Right to Confront Witnesses and Tainted the Fact-Finding Process Thereby Depriving Him of Due Process.

A. Petitioner was Deprived of His Fourteenth Amendment Right to Due Process.

The Wade court was prompted by increased judicial sensitivity to the fact that:

> [t]he influence of improper suggestion upon identifying witnesses probably accounts for

> more miscarriages of justice than any other single factor--perhaps it is responsible for more such errors than all other factors combined.
> Wall, Eyewitness Identification in Criminal Cases, 26, quoted in United States v. Wade, supra, at page 229.

In Stoval v. Denno, 388 U.S. 293, (1967), the court prohibited the police from refreshing a witness's recollection by use of a suggestive pretrial identification procedure because such practices might violate a defendant's Fourteenth Amendment right to due process of law.

Similar concerns have prompted most state courts considering the issue to rule that hypnotically-induced testimony is tainted with improper suggestion. See, e.g., State v. Mena, 128 Ariz. 220 (1981); People v. Gonzalez, 108 Mich.App. 145 (1981); Commonwealth v. Nazarovitch, 496 Pa. 97 (1981); State v. Palmer, 210 Neb. 206 (1982); and Commonwealth v. Kater, 477 N.E.2d 1190 (Mass. 1983). The New York

Court of Appeals recently joined the growing number of states which have specifically held that a victim who has previously been hypnotized may not testify about events which were the subject of the hypnotic session. In People v. Hughes, No. 232, slip op., N.Y. Ct. Ap. (July 5, 1983), slip opinion, the court noted that:

> The basic problem with admitting hypnotically generated statements or recollections in evidence is that hypnosis is an inherently suggestive procedure. In fact, suggestion is the method or mechanism used to induce the hypnotic state... These are points on which all of the experts who testified ... agreed and, as indicated, they are supported by the literature on the subject. People v. Hughes, supra.

The California Supreme Court adopted a similar prohibition against the testimony of a previously-hypnotized witness in People v. Shirley, 31 Cal.3d 18 (1982).

The Court in Shirley based its opinion on findings that the type of evidence created through hypnosis taints the fact-finding process. As the court noted,

hypnosis is a process of suggestion. Persons under hypnosis experience a compelling desire to please the hypnotist by reacting positively to his suggestions, thereby making a differentiation between true memories and confabulations impossible. Finally, hypnotism creates a new "memory" for the subject -- one that becomes so fixed that traditional legal techniques such as cross-examination may be unable to expose its unreliability. The dangers of allowing such evidence to persuade a jury of guilt or innocence arguably become most pronounced when the very identification of the defendant as the perpetrator rests on memory tainted by hypnotism.

The techniques utilized in the instant case were the kind condemned in Shirley. The procedure was by nature suggestive. Instead of posing open-ended questions, officers led Ms. Cusack through the

revision of her first composite drawing. The post-hypnotic suggestions indelibly implanted in Ms. Cusack's mind this new memory of the suspect. After hypnosis, Jane Cusack did not merely corroborate or substantiate the People's case after being hypnotized -- she identified Petitioner! The People offered no evidence other than Ms. Cusack's post-hypnotic identification of Petitioner to support her characterization of him as the man who attacked her. The trial court learned of the inherent unreliability of Ms. Cusack's testimony during lengthy pretrial hearings concerning its admissibility. Concerns about making allowances for routine investigative techniques must certainly vanish if their ostensible result is the conviction of the wrong man. Unfortunately, the Shirley decision was not rendered until Petitioner's case was pending on appeal. Had Ms. Cusack been

hypnotized after the date of Shirley, her testimony would clearly have been inadmissible at Petitioner's trial. The Fourth District Court of Appeal, in refusing to apply the Shirley rule to Petitioner's case, followed lower court cases where little evidence was supplied to indicate hypnotism had seriously damaged the fact-finding process. See, People v. Williams, 132 Cal.App.3d 920 (1982); People v. Adams, 137 Cal.App.3d 346 (1982), cited by the Court of Appeal, pages 9-14, Appendix "A". The facts of Petitioner's case are dissimilar.

B. Hypnotism Effectuated a Denial of Petitioner's Right to Confront Witnesses.

The Sixth Amendment's Confrontation Clause is made applicable to state criminal prosecutions through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Basic to the right of confrontation is the right of cross-examination. Pointer v. Texas, id, at 380 U.S. 404. As the Pointer court explains:

> There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's Constitutional goal. Id, at 405.

This court has looked to improperly suggestive pretrial identification procedures as a source of Confrontation Clause problems. In Moore v. Illinois, supra, the Court warned that a witness who has made an identification based on improper suggestion "will be predisposed to adhere to this identification in subsequent testimony at trial." Note 5, 434 U.S. at 230. The Minnesota Supreme Court in State v. Mack, 292 N.W.2d 764 (Minn. 1980), best explains the effect of improper suggestions

through pretrial hypnotic sessions:

> In addition to its historical unreliability, a "memory" produced under hypnosis becomes hardened in the subject's mind. A witness who was unclear about his "story" before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis. The conviction is so firm that the ordinary "indicia of reliability" are completely erased, and hypnotic subjects have been able to pass the detector tests while attesting to the truth of statements they made under hypnosis which researchers know to be utterly false. It would be impossible to cross-examine such a witness in any meaningful way.
> State v. Mack, supra, at 769.

For these reasons, the trial court erred in admitting Ms. Cusack's testimony. Petitioner has fully and accurately preserved this issue for review. Full hearings were held in the trial court, an appeal was made to the Court of Appeal, a Petition for Hearing was filed and denied by the California Supreme Court, and this Petition for Hearing has been timely filed. Consideration of these issues will allow the Court to redress the violations of Mr.

Haynes' constitutional rights by uniformly applying existing law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to review the judgment and opinion of the California Court of Appeal.

Dated: October 11, 1983

Respectfully submitted,

SHEELA, RUTHERFORD & SHEELA

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SHELTON NOEL HAYNES, Defendant and Appellant.	4 Crim. No. 13668 (Super. Ct. Nos. 53631 and 53980)

Shelton Hoel Haynes appeals his convictions for five counts of assault with a deadly weapon (Pen. Code, §245(a)),[1] with one allegation of great bodily injury (§12022.3, subd. (a)), four counts of assault with intent to rape (§220), each with an allegation of use of a deadly weapon (§12022, subd. (b)), and with one allegation of infliction of great bodily injury (§12022.7); three counts of kidnapping (§207), each with an allegation of use of a deadly weapon (§12022, subd. (b)), and with one allegation of infliction of great bodily injury (§12022.7);

[1] All statutory references are to the Penal Code unless otherwise specified.

APPENDIX A

two counts of unlawfully taking and driving a vehicle (Veh. Code §10851); one count of robbery (§211), with an allegation of use of a deadly weapon (§12022, subd. (b)); one count of forcible oral copulation (§288(a), subd. (c)), with an allegation of use of a deadly weapon (§21022.3, subd. (a)); one count of forcible rape (§261, subd. (2)), with an allegation of a use of a deadly weapon (§12022.3, subd. (a)); and, one count of attempted kidhaping (§207/664), with an allegation of use of a deadly weapon (§12022, subd. (b)).

Factual Background

On January 31, 1981, at about 10:30 p.m., Jane C. was attacked leaving Hoagie's Market at 35th Street and El Cajon Boulevard in San Diego when a man threatened her with a knife and said, "Give me your money." Jane gave him three dollars and was told to "Strip," and to move to the passenger seat of her car. As Jane unbuttoned her shirt, her assailant drove her first to a motel where he purchased Benson & Hedges menthol cigarettes, and then to the beach. He forced her to orally copulate him, then raped her in the car. Jane's assailant told her his name was "Junior," and he was a mechanic who probably could fix

her poorly running car. At about 1:15 a.m. on February 1, the assailant drove back to 35th and Meade, about a block from where he had accosted Jane, and got out.

Jane described her assailant to the police as a black male with regular build, about 5'7", and about 140 to 150 pounds. Jane was shown eight sets of photographs, with six photographs in each set, but did not identify any of the photographs as being that of her assailant. Haynes' picture was not among them. A police artist made a composite drawing of the man's face based on her description. Later a police hypnotist conducted a hypnotism session with Jane in order to provide a clearer composite picture of her assailant. While under hypnosis, she was twice told if she in the future saw the man she was describing, either in person or in a photograph, she would have no problem recognizing him. A new composite drawing made while Jane was hypnotized was given to officers in the field.

At 6:20 p.m. on February 1, 1981, Linda O. was returning to her car in a laundromat parking lot at 33rd and El Cajon Boulevard when a man put a knife

in her back and said, "Get in the car." Linda resisted and her jacket was sliced. Linda ran in front of the car, staring at her assailant who stood in back of the car. He walked rapidly away yelling he was going to "get her." Linda described him as about 5'6" to 5'7", and about 120 pounds.

At about 7:15 the same evening as the attack on Linda, Elizabeth S. drove to the Hoagie's Market where Jane was attacked. A man opened the car door and ordered her to move to the passenger seat. After she complied, her attacker got in the driver's seat, brandished a knife, and tried to start the car. He then ordered Elizabeth to start the car for him and to shift it into reverse. While driving, the attacker said, "Strip." The attacker put on a pair of black gloves. While the car was still moving at 25 to 30 miles per hour, Elizabeth stepped out and as she was falling, her attacker stabbed her in the side. Badly hurt, Elizabeth ran to a house and called the police. Elizabeth lost a great deal of blood through her stab wound, was hospitalized, and received medical treatment for three to four days. Elizabeth also sustained injury to her head from hitting the asphalt when she

was trying to get out of the moving car. The police showed Elizabeth several groups of the photos which they had shown to other victims. Elizabeth made an identification from one set of photographs which she felt was "very similar" to her attacker. This was not a photograph of Haynes. Later, she positively identified Haynes at a live lineup and in court. Silva's car was recovered at the 4600 block of Felton Street.

Less than two hours after the unsuccessful attacks on Linda and Elizabeth, Gwendolyn W. was accosted at Orange Avenue and 41st Street. The man pressed a knife tip against her. After her attacker threatened to stab her, he told her to "Strip." Gwendolyn ran across the street screaming. Her attacker fled.

Gwendolyn described her attacker as slim and about 5'10", young, with an unusual hair line and faint mustache. Gwendolyn told the police she could identify him. When shown the photographs presented to other victims, she identified none. Her later identifications of Haynes at a lineup and at trial were not made with absolute

certainty.

A week later Jewell H. was attacked at 7 p.m. outside a different laundromat by a black man who got into the driver's seat of her car. On his order, she moved over and noticed the man had an open knife at her side. The attacker put on red knit gloves with a white flower design and placed the knife against Jewell's throat as he drove. He drove for about 25 to 30 minutes, asking Jewell if she would have oral sex with him. The man told her his name was James, he was from Detroit, and he had three brothers. He also used the name "Junior." He told Jewell a lot of people thought he was in the Navy because his hair was so short but, in fact, he was not in the military. He added he was an air mechanic at PSA and he and his brothers were all named after his father. He told Jewell he knew where she lived and knew she had been in a car accident. (She had been.) The man put the knife away and fondled her breasts. Eventually, the man drove to a U-Totem in Encinitas where he stopped so Jewell could get something to drink. Jewell's assailant held her wrist as they walked into the

store but Jewell broke away, ran into a back room, and locked the door, where she stayed until law officers arrived. The ordeal lasted over an hour and a half. Her attacker fled in her car.

Jewell described her attacker as about 5'11" tall and 165 pounds. When her car was found near the area where the previous attacks occurred, it contained a large number of cigarette butts. Although most were Marlboroughs (Jewell's brand), a single Benson & Hedges cigarette butt was found in her car. Though Jewell was not shown any of the eight photographic lineups shown to the other four victims, none of which had Haynes' picture or elicited a positive identification, she later positively identified Haynes as the attacker at a live lineup and again at trial.

Haynes, who is 6'1", was stopped on February 26, 1981, by Officer Penalosa in the 4400 block of El Cajon Boulevard because he believed Haynes closely resembled the composite drawing of Jane's attacker. Haynes resided near the Hoagie's market where two of the recent attacks had occurred and in the neighborhood of the other attacks. His full name is Shelton

Noel Haynes, Jr. The officer knew the attacker had told one victim his name was "Junior." The officer also recalled one victim reported her attacker had an accent "possibly Jamaican," and he noticed Haynes spoke with an accent, although he did not think it was Jamaican. The officer asked Haynes if he had any weapons, and Haynes produced a buck knife of the type described by some of the victims. Haynes was taken to the police station. After being advised of and waiving his Miranda rights, Haynes was questioned, his photograph was taken and he was released. The photograph was included in a photo lineup shown to Jane, and she identified Haynes as her attacker. Haynes was arrested at about 3:45 p.m. on Thursday, February 26, 1981. He was booked at 7:00 p.m. that evening, and the police arranged for him to participate in a live lineup at 1:00 p.m. on Monday, March 2, which was the earliest time the police could obtain use of the lineup room. Although Haynes requested an attorney be present at the lineup, his request was refused.

All five victims attended the lineup, and identified Haynes as their attacker. Haynes was arraigned at 2:00 p.m. on

March 3 on a felony complaint charging him with the 18 offenses related to the attacks on the five victims. The counts relating to Elizabeth were later processed separately but consolidated for trial.

A search warrant was issued for Haynes' residence based upon a police affidavit which relied in part on Jane's description, her photo identification of Haynes, and the identification by all five victims at the live lineup. A pack of Benson & Hedges cigarettes was found in Haynes' refrigerator, and a pair of red knit gloves with floral design and a pair of black gloves were also seized. Haynes smoked Benson & Hedges cigarettes during his February 26th interview.

It was established at trial Hayes lived within walking distance of the area where four of the attacks occurred and the stolen car was abandoned. Further, Haynes had previously lived one block from where Jewell was attacked. Also, he was taking night courses in auto mechanics.

The court denied Haynes' pretrial motion to suppress evidence of the live lineup because his delayed arraignment deprived him of counsel at the lineup.

At trial, evidence of the live lineup

was introduced through each victim. Jane made an in-court identification of Haynes as her assailant, and consistent with her post-hypnotic suggestion, stated she felt quite positive about this identification. Elizabeth, Linda and Jewell also made positive in-court identifications of Haynes. Gwendolyn expressed uncertainty at trial whether Haynes was her attacker, but stated she was certain at the time she picked Haynes out of the live lineup she had accurately identified him. In addition, the employee of the U-Totem in Encinitas who called the police during the attack on Jewell testified he had been shown the photo lineup which included a picture of Haynes, and positively identified Haynes from the picture as the man who brought Jewell to the store. This employee had not attended the live lineup.

The jury convicted Haynes on all counts and he was sentenced to 37 years in prison.

Evidence showed Haynes lied to the officers about his activities on the day Jewell was attacked and that an analysis of saliva secretions left on the Benson & Hedges cigarette butt found in

Jewell's car showed they were made by an AB secretor two plus two plus. Only .04 percent of the population fall within this type, one being Haynes. Further, one of two analyses of secretion stains on Jane's pants gave positive findings of AB secretor two plus two plus secretions. Neither Jane nor her boyfriend fit this type. An earlier, separate police analysis of this and other samples yielded results excluding Haynes. These discrepancies were vigorously explored during trial.

JANE'S IDENTIFICATION TESTIMONY WAS PROPERLY ALLOWED

Our Supreme Court declared a witness in a criminal case is absolutely prohibited from testifying to anything related to the events which were the subject of a hypnotic session. (People v. Shirley, 31 Cal.3d 18, 66-67 (cert. den., 103 S.Ct. 133.)) The parties to this case argue at length over Shirley's retroactivity. The Supreme Court left open this possibility by announcing in Shirley: "The principles stated in this opinion will govern the admissibility of the testimony of any witness who submits to pretrial hypnosis after the date of this

decision. We take no position at this time as to the application of those principles to witnesses hypnotized before the date of this decision." (People v. Shirley, 31 Cal.3d 18, 67, fn. 53.)

In People v. Williams, 132 Cal.App.3d 920, the second division of this district considered the factors involved in determining whether a decision is to be retroactively applied and held Shirley is not to be so applied (id. at pp. 924-925). This court, since Williams, has twice addressed pre-Shirley hypnotism cases and both times did not apply the Shirley rule.

In People v. Adams, 137 Cal.App.3d 346, the court observed we are bound to give great weight to the trial court's determination there was no evidence the hypnotized witness' testimony was in any fashion based upon hypnotic suggestion (id. at p. 351). On the question of protecting the right to effective cross-examination in the context of a hypnotized witness, this court said "Shirley did not go so far as to say hypnosis per se precluded effective cross-examination in all pre-Shirley cases, and Adams makes no showing hypnosis affected his ability to cross-examine Mrs. Taylor" (id. at p. 352).

In Adams, the hypnotized witness made the first identification at a photographic lineup held after the hypnosis, and repeated with positive identifications at another photo lineup, a live lineup, the preliminary hearing and the trial. After an in camera hearing on the admissibility of the hypnotized witness' testimony at which the court examined a recording of the entire hypnosis session, the trial court in Adams overruled the defendant's objection to the testimony. This court concluded:

> "We can find no fact basis here compelling application of the Shirley principles to this case. In Shirley the prosecution contaminated the testimony of the sole witness 'by subjecting her to a hypnotic experience on the eve of trial for the purpose of "filling the gaps" in her story.' [Citation.] The victim's testimony in Shirley was 'vague, changeable, self-contradictory [and] prone to unexplained lapses of memory.' [Citation.] No contamination is shown in this case. Mrs. Taylor [the hypnotized witness] never waivered in her identification of Adams, her statements prehypnosis are consistent with her posthypnosis testimony. Adams does not direct us to any testimony produced by hypnotic suggestion

> nor did the trial court discover any improper influence when it reviewed the tape." (Id. at p. 352).

Similarly, in People v. Parrison, 137 Cal.App.3d 529, this court deferred to the Williams holding Shirley is not retroactive and held, in the face of expert testimony the hypnosis session was inadequate and overly suggestive, the trial court did not abuse its discretion in impliedly finding the hypnotized witness' testimony sufficiently reliable to permit him to testify. In connection with the claim the hypnotized witness became impervious to cross-examination, we said (at p. 539):

> "We are unable to determine if Parrison's rights have been denied because he has not provided a sufficient factual basis for his claim. Absent a demonstration based upon the totality of the circumstances that the particular hypnosis was so suggestive to constitute a constitutional violation [citation], we cannot conclude [the hypnotized witness'] testimony should have been excluded."

This case presents a situation essentially the same as in Parrison. Moreover, it is immediately apparent,

giving due weight to the trial court's ruling on Haynes' motion to exclude Jane's testimony, the factual circumstances of Haynes' case are not distinguishable from those in Adams. The only possible distinction is the presence of expert testimony for the defendant here but not noted in Adams. The witnesses here, Drs. Pratt and Girsh, both called by Haynes, did not present testimony at the pre-trial hearing concerning this particular hypnosis that would compel the conclusion Jane's testimony was inadmissible because of the unreliability of hypnosis or its tendency to create a witness who is unshakable by cross-examination. Their testimony merely tended to support these conclusions on a generalized basis. Moreover, their testimony was weakened by such factors as Jane's own testimony raising doubt she was hypnotized in the first place and denying any enhancement of memory from it, as well as by effective examination which brought out matters such as the basic inaudibility of the tape recording of the hypnosis session, the fact only parts of the tape were listened to, and cautious opinions on

the results of the hypnosis.[2]

As was the case in Adams, the showing

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[2]Dr. Pratt, for example, said, "the witness may very probably have been contaminated, and be biased through the unconscious cuing and inadvertent cuing . . . confabulation could certainly occur . . . the potential and probability existed for unconscious biasing . . . that biasing has to be strongly considered [and when asked if he is talking of a possibility or a probability with respect to this hypnosis, Dr. Pratt responded"] "considering the frequency with which it happens, a probability." Dr. Pratt said if Jane's statements after hypnosis were independently corroborated, her testimony would be trustworthy.

Dr. Girsh spoke of her speculating on the effects of the hypnosis, acknowledged there was no way to tell whether Jane was actually hypnotized and said, among other things, during questioning by Haynes' counsel:

"A There is not the slightest doubt in my mind that the words that the hypnotist said to her put an expectation in her mind that she shouldn't be there, because it doesn't conform with the realities of how the mental apparatus works. It's just as likely that she forget what the person's fact looked like. It's just as likely that she never will recognize or she may, you know. There's no way to tell.

"Now, whether that contamination took is another question. Her ability to identify her assailant may be perfect now, it may have been perfect before.

"The hypnotist's suggestion may not

at the pretrial admissibility hearing demonstrated neither unreliability of the

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have contaminated her ability to make an identification , or it may have. The question is did -- but, from an objective point of view, having planted that in her mind, changed her -- it changed her ability to be the same objective person that she was before. And that's the problem with was she contaminated, or wasn't she.

"Q Would it be true to say that all you can state is that there is a probability of such contamination having occurred?

"A Yes, just like there's a possibility that she was hypnotized, because the hypnotic --

"Q Procedure?

"A -- procedure was done to her.

"Q And what would the effect of the hypnosis and the possible contamination or confabulation have in regards to subsequent cross-examination of her on the witness stand, say, during a trial, or during a court procedure?

"A Well, the most significant effect it would have would be to give her a feeling of her confidence in her education, which would probably be erroneous, but that's what we're talking about. That's where the contamination comes in, but she was told that when she makes the identification, it will be accurate, so she will have a feeling of confidence that may or may not be false."

hypnotized witness, Jane, nor any impairment of Haynes' ability to cross-examine her. The showing was merely that hypnosis might have those effects on a witness and the trial court, under the law then in effect, could properly determine those effects did not pertain to Jane. Following Adams, Parrison and Williams, the trial court's determination is sustained.

HAYNES' ARRAIGNMENT WAS NOT UNNECESSARILY DELAYED AND THE OFFICERS DID NOT UNCONSTITUTIONALLY DENY HIM APPOINTED COUNSEL AT THE LIVE LINEUP

Prompt arraignment is the fundamental right of an arrested person and a detention of less than two days, if unreasonable under the circumstances, violates section 825 and California Constitution, article I, section 14. (People v. Thompson, 27 Cal.3d 303, 329.)[3]

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[3]Section 825 reads, in part: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in

One of the fundamental rights afforded to a defendant at arraignment is appointment of counsel.

Haynes was not arrested until he had been first detained and questioned, found to have been in possession of a buck knife resembling the description given by several of the rape victims, including Jane, and photographed. The officers knew he fit the general description of the person who sexually molested Jane as well

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session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following."

Article I, section 14, reads in part: "A person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court. The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send for counsel, and on the defendant's request read the complaint to the defendant. On the defendant's request the magistrate shall require a peace officer to transmit within the county where the court is located a message to counsel named by defendant."

as other victims, lived in the area where the offenses had occurred, and his booking photograph had been positively identified by Jane as the person who had committed the crimes against her. The prosecution admitted to the trial court there was ample evidence to immediately obtain a complaint against Haynes on the incident regarding Jane at the time he was arrested. However, the prosecution argued the delay was for "study and investigation to make certain that grounds exist to support a criminal complaint" (see People v. Johnson, 85 Cal.App.3d 684, 689), i.e., to allow the district attorney to evaluate it to determine what additional charges could be filed in the other attacks. The prosecution pointed out there was not questioning of Haynes from the night of his arrest to the time of arraignment and all that was done was to arrange for the lineup at the jail lineup room for the earliest possible time, 1 p.m. Monday, and to contact victims and one witness to request they attend the lineup. The prosecution sought to avoid the holding of People v. Williams, 68 Cal.App.3d 36, 43, quoted in People v. Thompson, supra, 27 Cal.3d 303, 329:

"' [t]here is no authority to delay for the purpose of investigating the case.'" The prosecution convinced the trial court the delay in arraigning Haynes was reasonable, as the court said, "not to prejudice the defendant, but to provide the necessary material for the district attorney to evaluate the case and to file a complaint."

People v. Williams, supra, 68 Cal. App.3d 36, 42 (disapproved on another point in People v. Bustamante, 30 Cal.3d 88, 102), sets out the rule applicable to this case:

> "[F]ailure to promptly arraign a defendant is an unlawful practice and such police conduct will be subject to close scrutiny. [Citation.] However, in order to obtain reversal of a conviction on this ground, the defendant must show prejudice resulting from the delay. [Citation.]
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> " . . . it is prejudicial error to admit into evidence any identification of a defendant made at a post-arrest, pre-complaint lineup when all of the following conditions exist:
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> "1. Defendant's counsel is not present and there has not been a waiver of counsel.

"2. Law enforcement officers have failed to take the defenadnt before a magistrate without unnecessary delay.

"3. A lineup takes place during the period of an unnecessary delay."[4]

There was no unnecessary delay here. After the single photographic lineup identification by Jane, it was appropriate to arrange for the live lineup as promptly as possible after the arrest, and this was done. Given the number of other victims and the variables connected with the offenses against them, it was reasonable to gather them together for the single lineup in order to determine whether to file and what charges should be filed in their respective cases. The considerations involved in the delay were not substantively dissimilar to those in People v. King, 270 Cal.App.2d 817, where the time between the arrest of five suspects and the arraignment of two was

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[4]People v. Bustamante, 30 Cal.3d 88, was decided after the verdict was rendered in this case. Bustamante gives the right to counsel to an arrested person subjected to a prearraignment lineup. Its holding, however, is made expressly prospective.

used "to discriminate between those suspects who would be publicly charged with murder and those who would not" (id. at p. 823). King also said:

> "The charge of murder is generally considered to be the most serious of all criminal charges, and it should not be publicized lightly or casually. . . . The delay in arraignment appears to have been brought about, not for the purpose of eliciting damaging statements from an accused, but rather for the purpose of untangling a skein of circumstantial evidence which implicated five suspects in varying degrees and rationally determining from the weight of available evidence which of the five suspects should be publicly charged with murder." (270 Cal.App.2d at p. 823.)

Here, the crimes also were serious, thus deserving careful attention. They were variable crimes not always involving, for example, a kidnap, a sex act or a car theft, and there were numerous crimes in each victim's case. Probable cause to believe Haynes' involvement in each of the crimes not involving Jane was by no means established until the Monday lineup, there having been only a single victim's identification relating

to one series of crimes. In one instance, Haynes had lied about his activities. Under the circumstances, there was no unnecessary delay. Thus, the Williams conditions of prejudicial error in admitting the postarrest, precomplaint lineup identification evidence are not fulfilled in this case.

We note in passsing, Haynes conceded at the pretrial hearing on admissibility of the lineup evidence that at the preliminary hearing[5] the prosecution elicited testimony of four of the five victims (not Elizabeth) to the effect their in-court identification was the result of the incident and not what they saw at the lineup. In discussions with counsel at the pretrial admissibility hearing, the trial court took note of the identification testimony given at the preliminary hearings. Thus, even assuming unnecessary delay, there is evidence from which the court could conclude a later in-court identification at the trial before the jury by the four victims whose identification

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[5]The transcript of the preliminary hearing was before the court for purposes of the pretrial hearing on admissibility.

at the preliminary hearing was inspired by the incident and not the lineup would have "rested upon an independent and untainted source" (People v. Teresinski, 30 Cal.3d 822, 834-835).

In none of the cases has Haynes shown any prejudice resulting from delay in arraignment. Thus, his contention attacking the identification testimony fails.

THE DETENTION AND LATER ARREST OF HAYNES WERE PROPER

Next, Haynes meritlessly contends his initial detention was not supported by a reasonable suspicion and his arrest was not based upon probable cause. However, Haynes was initially detained because the officer believed him to be physically very similar to the person depicted in Jane's composite drawing of her attacker and he was in an area near where the attacks were occurring. Thus, the officer was amply justified in stopping Haynes to ask questions. From questioning, the officer determined Haynes had a Jr. in his name, a name used by the attacker, he lived near the attack area and near the location in which cars stolen from two of the victims were later

found, he spoke with an accent and carried a buck knife. The totality of this information supplied probable cause to arrest Haynes for the purpose of photographing and questioning.

Finally, Haynes claims the officers later unlawfully arrested him without warrant at his residence in violation of the proscription of People v. Ramey, 16 Cal.3d 263, 275-276. However, Ramey specifically ruled warrantless arrests within the home in the absence of exigent circumstances were unlawful. Here, the trial court heard the evidence and found Haynes voluntarily stepped outside his home onto the porch where the arrest took place. Its finding is supported by the record. Inducing a person to voluntarily step outside the confines of his home for the unannounced purpose of placing that person under warrantless arrest has been held not to violate Ramey, even though the arrest was made on the defendant's property (In re Gregory S., 112 Cal.App.3d 764, 775). The fact the inducement was a ruse does not vitiate the officer's authority to make the

arrest. (People v. Porras, 99 Cal.App.3d 874, 877-878.) The arrest was lawful.

Judgment affirmed.

COLOGNE, J.

I CONCUR:

BROWN, P.J.

Because I find fundamental error in permitting the in-court identification by each victim, I dissent.

THE HYPNOTIZED WITNESS' IDENTIFICATION TESTIMONY SHOULD HAVE BEEN EXCLUDED

Although the unreliability of a previously hypnotized witness when testifying to events which were the subject matter of the hypnosis session is graphically portrayed in People v. Shirley, 31 Cal.3d 18, retroactivity of the per se rule of exclusion announced by the Supreme Court is of no concern here.[1]

Our precise issue is whether the evidence shows Jane's hypnosis session contaminated her later identification of Haynes through post-hypnotic suggestions, depriving him of the right to meaningfully cross-examine her. Although this subject is discussed generally in Shirley, supra, 31 Cal.3d 18, 65-66, the facts here compel a finding the two post-hypnotic suggestions given June by the police officer hypnotist would elevate her confidence in a later identification even if it were erroneous.[2]

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[1] The Supreme Court is presently grappling with this issue in People v. Aquino (Crim 22657, hg. granted June 24, 1982).

[2] Unlike the facts in People v. Parrison, 137 Cal.App.3d 529, 539, where Parrison provided absolutely no facts showing any impairment of his Sixth Amendment rights, and People v. Adams 137 Cal.App.3d 346, which never discussed this issue. The majority's reliance on Parrison and Adams is illusory.

Only two expert witnesses, Dr. Girsh and Dr. Pratt testified to the validity of the hypnotic techniques used. Each stated there was a high probability of contamination on the issue of future identification.[3] Dr. Pratt testified even the minimal standards established by the FBI for investigatory hypnosis were not followed.

More importantly, each declared the two post-hypnotic suggestions would likely artificially elevate her confidence in the correctness of any future identification she made. Dr. Girsh stated she would be absolutely sure her identification, whether or not accurate, was correct after she identified some person resembling her assailant, making her invulnerable to cross-examination. Dr. Pratt stated the effect would be to make Jane rather "resilient" and "impervious" to cross-examination. (See Shirley, supra, 31 Cal. 3d 18, 69, fn. 56.)

Although the police officer's post-hypnotic suggestions were couched in terms Jane would have no difficulty "in recognizing the person in the future," he admitted his suggestions were directed at the image Jane was visualizing while in the hypnotic

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[3] Especially a cross-racial identification.

trance while being confronted with a composite drawing elicited by leading questions from the artist.

The right to cross-examine an accuser is fundamental. (Cal.Const., art.I, §15; U.S. Const., Sixth Amend.) Where this right has been denied, no amount of showing of lack of prejudice can overcome the constitutional error. (Brookhart v. Janis, 384 U.S. 1.) Where the right is unduly impaired, a reversal may be required. (People v. Murphy, 59 Cal.2d 818, 831; People v. Bradley, 115 Cal.App.3d 744, 749.) Here, the impairment or denial was created solely by direct, voluntary police action, and is prejudicial. It was error to allow Jane to testify to any identification of the assailant after the hypnosis session.[4]

However, Haynes' further contention the hypnosis of Jane mandates a reversal of the remaining 13 counts is meritless. He argues the affidavit submitted by Detective Evans to obtain a search warrant for his residence was based largely on information derived from the hypnosis session. Shirley does not require us to suppress such evidence. In Shirley, the

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[4] Unlike the hypnotized witness in Shirley, Jane did not testify at the preliminary hearing until after hypnosis. Therefore, on retrial her preliminary hearing testimony could not be introduced as prior testimony of an unavailable witness. (Evid.Code, §240, subd.(a)(2)). However, the physical descriptions given to the police before hypnosis would not be excluded.

Supreme Court stated: "any person who has been hypnotized for investigative purposes will not be allowed to testify as a witness to the events that were the subject of the hypnotic session. Evidence discovered by such an investigation, of course, is not ipso facto rendered inadmissible by the prior hypnosis." (People v. Shirley, supra, 31 Cal.3d 18, 68, italics added.) The physical evidence seized is the type of admissible evidence to which the Supreme Court referred.

THE UNNECESSARY ARRAIGNMENT DELAY UNCONSTITUTIONALLY DENIED HAYNES OF COUNSEL HE REPEATEDLY REQUESTED TO BE AT HIS POST-ARREST LINEUP

After the prosecution admitted there was ample evidence to immediately obtain a complaint against Haynes on the incident regarding Jane when he was arrested, it attempted to justify the deliberate arraignment delay as a conscientious police[5] effort to compile evidence allowing the district attorney to evaluate what additional charges could be filed. The prosecutor specifically denied the deliberate delay was for the purpose of investigation to avoid the holding of People v. Williams, 68 Cal.App.3d 36, 43, quited in People v. Thompson, 27 Cal.3d 303, 329: "[t]here is no authority to delay [arraignment] for the purpose of investigating

[5] The district attorney apparently was not consulted.

the case." In spite of the majority's acceptance of this characterization, the live lineup was absolutely part of the ongoing police investigation. It was a fact-finding endeavor conducted solely to obtain additional evidence against Haynes. The arresting officer testified at trial he was not concerned about arraignment, only with completing his "investigation within the legal time." The People have the burden to show legal justification for the delay in arraignment. (People v. Cook, 135 Cal.App.3d 785, 792.) They have not carried it.

The majority ignores Haynes' repeated requests for counsel to be present at the lineup, apparently finding no right to this important protection. However, the burden on law enforcement would have been minimal. Evidence shows counsel was immediately available. An attorney for Defenders, Incorporated (San Diego County's de facto public defender service) testified its main office is across the street from the jail where Haynes was confined. It is staffed by 14 or 15 lawyers who routinely appear for indigents at pre-arraignment lineups upon requests forwarded through the police department.

Had the law enforcement officers complied with the law regarding prompt arraignment, Haynes' right to counsel would have been

absolute and the results of any lineups held in absence of counsel would have been excluded. (Gilbert v. California, 388 U.S. 263, 272-273.) Here, this absolute right to counsel was denied solely through illegal conduct of law enforcement.[6] Although People v. Bustamante 30 Cal.3d 88, was decided too late to dispose of the issue in this case, both its majority and concurring opinions discuss counsel's important role at lineup.[7] Under the facts of this case I find constitutional error in admitting the lineup identification by each victim.

The majority cites People v. King, 270 Cal. App.2d 817, to justify the arraignment delay to permit full evaluation of all potential charges. This mischaracterizes King's holding.

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[6] "Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemenaor." (Pen.Code, § 145.)

[7] For instance, all victims attended the same lineup and were allowed to mingle unsupervised before the viewing began after being cautioned not to speak to each other. In spite of this important admonition, they did talk among themselves. Although no one admitted discussing this case, it is impossible to ever determine the prejudice, if any, of this comingling. Counsel would have prevented this..

There, several defendants were being held and it was not immediately apparent who actually committed the murder, and who only participated in incidental crimes. Here, a single defendant was arrested for specific crimes against a specific victim.

Although denial of counsel under these circumstances forbids the court to admit evidence of the lineup identification, in-court identifications are admissible if they are shown to be based upon an adequate independent basis, untainted by the lineup. (People v. Teresinski, 30 Cal.3d 822, 834-835.) In spite of Hayne's request, the trial court here held no hearing regarding the independent source for in-court identification because it found it unnecessary to do so by determining Haynes was not entitled to counsel. Absent such hearing, Williams held evidence of the in-court identification was improperly admitted.

Even in the absence of express findings that a victim's in-court identification is based upon independent untainted recollection, such findings may be inferred from the court's remarks in the record. (People v. Teresinski, supra, 30 Cal.3d 822, 834.) Teresinski involved a motion to suppress in-court identification following the victim's viewing of photographs taken during an illegal detention.

The photographs and the identification from the photographs were suppressed, the in-court identification was not, the court stating it was satisfied the victim could identify the defendants and knew their physical appearance before viewing the mugshots. Unfortunately, here the court conducted no hearing, and made no comments reasonably construable as reflecting its opinion on this issue.[8] By not holding the hearing, it spurned Haynes' offer to produce a psychologist's testimony concerning the irrevocable taint infecting all in-court identification following a live lineup viewing. Here, as in Williams the in-court identification was admitted without a proper foundation.

At trial the prosecutor stressed the positive identification of Haynes by four of the five victims at the live lineup. There was no attempt to establish the in-court identifications were based on an independent source. The fifth victim (Gwendolyn) made no positive identification at the lineup or in court, but was certain Haynes physically resembled her attacker.

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[8] The majority's reference to testimony at the preliminary hearing is improper. Whatever the transcript of that hearing may contain, it was not made a part of the record on this appeal, and the trial court did not purport to rely on it in ruling on the motion to suppress the in-court identification.

The People urge there is sufficient evidence of guilt to sustain these convictions even without the lineup and in-court identifications. However, these identifications were the primary evidence against Haynes as to each victim. All other evidence is circumstantial. The burden on the People is to show the constitutional error in admitting the lineup identification is harmless beyond a reasonable doubt. (Chapman v. California, 386 U.S. 18, 22.) The impact of eye-witness identification is formidable and this record does not show beyond a reasonabld doubt different verdicts may not have been rendered in the absence of error.

Had the trial court held the required hearing and found, upon sufficient evidence, the in-court and photo identifications of Gwendolyn, Linda, Elizabeth and Jewell derived from an untainted source independent of the lineup, I would find the error in admitting evidence of the lineup identification harmless under the Chapman standard. Accordingly, I would not reverse the judgments on all counts relating to these four victims, but remand the cause to the trial court to determine that issue. After hearing, the trial court should grant Haynes a new trial on all counts relating to any victim whose in-court identification it determines should

be excluded, and reinstate the judgments on all counts relating to any victim whose identification it finds to be untainted by the counselorless lineup viewing. (See People v. Bustamante, supra, 30 Cal.3d 88, 103.)

Work,J.